No. 15863

United States Court of Appeals
For the Ninth Circuit

POPE & TALBOT, INC., a corporation, *Appellant,*
vs.
JACK V. CORDRAY, *Appellee.*

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

BRIEF OF APPELLANT

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BRIEF OF APPELLANT

I.

JURISDICTION

This civil action was commenced in the Superior Court of the State of Washington for King County by Summons (R. 6) and copy of Complaint (R. 7) served upon Appellant on August 21, 1956.

Verified Petition for Removal (R. 3) of the cause was filed in the United States District Court, Western District of Washington, Northern Division, by Appellant on September 5, 1956 (R. 10), based upon diversity of citizenship of the parties and amount in controversy in excess of $3,000, exclusive of interest and costs. The Complaint alleged a cause of action for personal injuries as a result of an alleged maritime tort, prayed for damages in the sum of $75,000, and alleged that plaintiff (Appellee) was a citizen and resident of the State of Washington while defendant (Appellant)

was a foreign corporation and a non-resident of the State of Washington (R. 7).

After jury trial commencing on November 7, 1957 (R. 48) and ending on November 15, 1957, a verdict in favor of the plaintiff (Appellee) and against the defendant (Appellant) was returned and filed on November 15, 1957, and entered on November 18, 1957 (R. 33).

Judgment on the verdict was entered on November 18, 1957 (R. 34). Order denying Appellant's post trial motions was entered on December 13, 1957 (R. 38).

Notice of Appeal was served and filed on December 16, 1957 (R. 42). A Cost and Supersedeas Bond in the sum of $32,000, approved by counsel for Appellee and by the trial Court, was filed on December 13, 1957 (R. 39-42).

Jurisdiction of the U.S. District Court for the Western District of Washington, Northern Division, is based upon Title 28 U.S. Code Section 1332 and Title 28 U.S. Code Section 1441.

Jurisdiction of the U.S. Court of Appeals for the Ninth Circuit is based upon Title 28 U.S. Code Section 1291.

II.

STATEMENT OF THE CASE

A. The Pleadings

By his original Complaint (R. 7) the Appellee sought to recover damages for personal injuries sustained while Appellee was aboard the SS P&T Adventurer

at a dock in the Port of Seattle on July 15, 1956. Appellee alleged in paragraph VI that a part of the cargo handling gear of the vessel "suddenly parted" and that a piece of gear fell and struck him, causing the alleged injuries (R. 9).

While Appellee alleged in his original complaint that he was a "foreman of longshoremen" and that his employer, Olympic Steamship Co., Inc., was an independent contractor "having complete control and supervision of operations pertaining to the loading and discharge of cargo" from the SS P&T ADVENTURER (paragraphs IV and III of complaint R. 8), he testified at the trial that he was working as a "dock foreman" (R. 309) and that his employer, Olympic Steamship Co., Inc., was not doing the stevedoring work of loading or discharging cargo from the vessel (R. 310). It was established by paragraph V of the Admitted Facts in the Pre-Trial Order (R. 17) that his employer, Olympic Steamship Co., Inc., was the operator of Pier 48 and was engaged only in "moving of cargo from ship's side to place of rest on dock" (R. 17). In paragraph VI of the Pre-Trial Order, it was established that Appellee was "a foreman over other shoreside workmen employed by Olympic Steamship Co., Inc., in handling said cargo on its said Pier 48" (R. 18).

By paragraph IV of the Admitted Facts in the Pre-Trial Order, it was established that another independent contractor, Seattle Stevedore Co., had "complete control and supervision of all operations pertaining to the discharge of cargo from the holds of Appellee's said vessel to the ship's side at Pier 48 * * * " (R. 17).

Seattle Stevedore Co. is not a party to this action, however its Stevedoring Contract with Appellant is in evidence as Exhibit A-9 (Text of exhibit at R. 463).

The original complaint (Paragraph VII) sought recovery only on the basis of alleged *unseaworthiness* of the vessel (R. 9, R. 323). Over objection of Appellant, the trial Court allowed Appellee to make a Trial Amendment (R. 13) adding charges of *negligence* to the allegations of Paragraph VII of the complaint (R. 14).

Appellant's Answers to the original and the amended complaints denied, *inter alia,* that Plaintiff (Appellee) was a foreman of longshoreman, denied that he was injured in the course of his duties and employment or that Appellee was obliged to traverse the deck of the vessel, and denied all allegations of unseaworthiness or negligence (R. 10, R. 15). An Affirmative Defense alleging contributory negligence of Plaintiff (Appellee) was set forth in the Answer which charged Appellee with "voluntarily placing himself or remaining in a dangerous position, in failing or omitting to take reasonable precautions for his own safety and in further negligent acts * * * " (R. 12).

In the Pre-Trial Order Appellant contended that the issues of fact for determination included the following:

(1) Whether Appellee or his employer, Olympic Steamship Co., Inc., had any duties or obligations by contract or otherwise to perform any of the loading or discharging of cargo to or from the Appellant's vessel;

(2) Whether Appellee as a dock foreman had any duties or legitimate business which required him to go aboard Appellant's vessel;

(3) Whether at the time of the accident Appellee was engaged in any of the cargo loading or discharging operations being conducted aboard the vessel;

(4) Whether the vessel was unseaworthy;

(5) Whether Appellant was negligent;

(6) Whether Appellee was contributorily negligent;

(7) The amount of any damages sustained by Appellee. (R. 19-22)

Appellant contended in the Pre-Trial Order that Issues of Law included:

(1) What was the status of plaintiff Cordray as a dock foreman while aboard the SS "P&T ADVENTURER" with particular regard to whether he was a longshoreman or stevedore, a business guest-invitee, a mere licensee or a trespasser?

(2) Was plaintiff Cordray within the class of workers to whom the defendant shipowner owed a duty to supply a seaworthy vessel?

(3) Is plaintiff Cordray entitled to recover damages from the defendant even though he fails to prove that his injuries were proximately caused by any negligence of the defendant as alleged in the complaint?

(4) Did defendant have a non-delegable duty to provide plaintiff Cordray with a safe place to work while plaintiff was aboard the SS "P&T ADVENTURER"? If so, can plaintiff recover damages

against defendant on proof of breach of any such alleged duty without proving negligence of the defendant? (R. 22-23)

Similar but separate Issues of Fact and of Law were submitted by Appellee and included in the Pre-Trial Order (R. 23-24).

At the close of plaintiff's (Appellee's) evidence, Appellant made and filed motion under F.R.C.P. 41(b) for dismissal based on the ground that upon the facts of record and upon the law applicable in this action, Appellee had shown no right to relief against Appellant (R. 25). At the same time, Appellant made and filed an alternative motion under F.R.C.P. 50 for a directed verdict against Appellee (R. 322), which was renewed at the close of all of the evidence (R. 391). The specific grounds for this motion were as follows:

"(1) That all such evidence fails to show that plaintiff is entitled to relief from defendant on the ground of *unseaworthiness;*

"(2) That all such evidence fails to show that plaintiff is entitled to relief against defendant on the basis of *negligence* or negligent failure to perform any duty owing from defendant to plaintiff;

"(3) That all such evidence fails to show any *unseaworthiness* of the vessel or *negligence* of defendant on the basis of which plaintiff would be entitled to recover against defendant." (Italics added) (R. 26, R. 322, R. 391)

All of the above motions were denied by the court (R. 327, R. 393) and in addition the trial Court denied separate motions presented by Appellant at the close of all the evidence to withdraw the issue of *seaworthi-*

ness and to withdraw the issue of *negligence* from the consideration of the jury (R. 322, R. 393).

The trial Court submitted the case to the jury on both the issue of *unseaworthiness* and the issue of *negligence* after Appellant had stated specific objections to instructions given by the court on both issues (R. 394, R. 421) and also specific objections to the refusal of the court to give to the jury certain instructions on both unseaworthiness and negligence which had been timely proposed in writing by Appellant (R. 27, R. 421-35).

The jury returned a verdict for $28,750 in favor of Appellee and against Appellant (R. 33). Alternative post-trial motions for Judgment Notwithstanding the Verdict, and for a New Trial were timely served and filed by Appellant and thereafter denied by the trial Court (R. 38). This appeal followed (R. 42).

B. The Facts

Appellant operates a fleet of merchant cargo vessels engaged in various trades. Among these vessels is the SS "P&T ADVENTURER," which at the time of the accident in question, July 15, 1956, was engaged on a voyage in the intercoastal trade, calling at Seattle to discharge and load cargo (R. 356).

Appellee was a member of the Longshoremen's and Warehousemen's Union (R. 364-5). Since a previous industrial accident in 1949 requiring a back operation for repair of a herniated disc in 1940 (R. 19), he had confined his work activities to driving a truck (bull) (R. 315). Occasionally, he had worked as an extra dock

foreman for Olympic Steamship Co., Inc. (R. 314), a public terminal operator (R. 174), and he was so employed as a dock foreman for the terminal operator at Pier 48 at the time of the accident (R. 309).

Seattle Stevedore Co., as stevedore contractor for Appellant, was conducting all of the loading and discharging operations aboard the SS "P&T ADVENTURER" at the time of the accident and had its own foremen on the job aboard the vessel. These foremen supervised all of the longshoremen working on the vessel and the slingmen employed by Seattle Stevedore Co. who were working on the dock. The foremen also supervised the use of the ship's cargo handling gear by the longshoremen (R. 50, R. 71, R. 310). Appellee, as a dock foreman employed by the terminal operator, had nothing to do with the stevedoring-discharging operations being performed on the ship by the stevedore contractor (R. 364).

According to Appellee he went aboard the vessel on the early morning of July 15, 1956, shortly before the accident to ascertain from one of the stevedore foremen for Seattle Stevedore Co. what gangs of longshoremen were going to quit working on the vessel so that Appellee, as dock foreman, could plan for and arrange to release men working under him on the dock, whose further services would not be required (R. 295).

While standing on the forward deck of the vessel near one of the stevedore foremen, Appellee was struck by a piece of a gantline wire strap or block which was part of the ship's gear (R. 54). Some time previously, this gear had been hung in place from the tip of one of

the booms at No. 2 hatch so that it would be available for use in the future in the event rain should necessitate rigging a hatch tent for protection of the cargo in the open hold (R. 97).

At the time of the accident longshoremen employed by Seattle Stevedore Co. were engaged in "winging in" or rounding in the booms and attached cargo handling gear (R. 84). There was *not supposed to be any strain* or stress on the hatch tent gantline and wire strap at that time, since no hatch tent was suspended from it and the lower end was *supposed to be slacked off* or unfastened at the point where it had been previously secured by longshoremen along the ship's rail or bulwarks (R. 84-5).

The wire strap at the upper end of this hatch tent suspension gear parted (R. 103-4). According to two of the mates of the vessel who testified as witnesses, this gear had been examined and serviced during the westbound intercoastal voyage within a few weeks prior to the accident and it had not been used extensively since that time (R. 98, R. 378-9). Their examination of the recovered portion of the wire strap after the accident indicated that it was still in good condition and showed evidence that it had parted under unusual and excessive strain (R. 104, R. 370-1) as demonstrated by the frayed and unwound strands of the strap. Pictures obtained of the broken strap one day after the accident are in evidence and reproduced in the transcript (R. 460-1).

III.

SPECIFICATION OF ERRORS

1. The trial Court erred in not granting Appellant's motion under F.R.C.P. 50 for a Directed Verdict against plaintiff (Appellee), which motion was based upon the failure of Appellee to prove that he was within the class of workers entitled to recover damages from Appellant as shipowner, either on the ground of *unseaworthiness* or on the ground of *negligence* to an invitee or business guest (R. 26, R. 322, R. 391, R. 434).

2. The trial Court erred in not granting Appellant's separate motions to withdraw the issue of *unseaworthiness* and to withdraw the issue of *negligence* from the consideration of the jury, which motions were based upon failure of Appellee to prove that he was within the class of workers entitled to recover damages from a shipowner on the ground of *unseaworthiness* or on the ground of *negligence* to an invitee or business guest (R. 322, R. 392).

> *Note*: Due to the length of the Instructions in the following Specifications of Error, and the length of the Exceptions taken by counsel for Appellant to the giving and refusal of such instructions, Appellant, after consulting with the Clerk of this Court, has set out the full text of such Instructions and the Exceptions in Appendix I and will refer to the same herein by Appendix page number, it being understood that this will be accepted as a compliance with the requirements of Rule 18(b) of this Court.

3. The trial Court erred in instructing the jury on *unseaworthiness* by its use of the term "cargo unloading longshoreman and his foreman" (R. 402-3) and the later use of the terms "cargo discharge arrangements"

and "cargo work" with respect to the dock handling operations, to which instruction Appellant duly excepted (R. 421-22). (For full text of Instruction and of Exceptions taken thereto, see Appendix I, page 47.)

4. The trial Court erred in instructing the jury on *unseaworthiness* (R. 437) by directing the jury that "employees of each of such contractors" had a right to go aboard the vessel in connection with the performance of their work in "discharging said cargo from the vessel," to which instruction (as revised by the trial Court) Appellant duly excepted (R. 423, R. 425, R. 428). (For full text of Instruction and of Exceptions taken thereto, see Appendix I, page 47.)

5. The trial Court erred in instructing the jury on *unseaworthiness* (R. 404) by its reference to Appellee as a "foreman of the dock-working longshoremen assisting on the dock in the discharge of the vessel's cargo," to which instruction Appellant duly excepted (R. 428). (For full text of Instruction and of Exceptions taken thereto, see Appendix I, page 47.)

6. The trial Court erred in instructing the jury on *unseaworthiness* (R. 405) by reason of its failure to include in said instruction appropriate language to enable the jury to determine as a fact the status of the plaintiff while aboard the ship, to which instruction Appellant duly excepted (R. 432). (For full text of Instruction and of Exceptions taken thereto, see Appendix I, page 47.)

7. The trial Court erred by its refusal to give Appellant's proposed Instruction No. 4 on *unseaworthiness* (R. 27-8) which included necessary language to deter-

mine the status of Appellee, to which refusal to instruct Appellee duly excepted (R. 432). (For full text of proposed Instruction and of Exceptions taken thereto, see Appendix I, page 47.)

8. The trial Court erred by its refusal to give Appellant's proposed Instruction No. 7 on *negligence* (R. 29) which included legal definitions of "invitee" and "licensee," to which refusal to instruct Appellant duly excepted (R. 433). (For full text of proposed Instruction and of Exceptions taken thereto, see Appendix I, page 47.)

9. The trial Court erred in its refusal to give Appellant's proposed Instruction No. 15 (R. 30-32) regarding damages and contributory negligence which included necessary language to enable determination by the jury as to Appellee's status aboard the vessel, either on the *unseaworthiness* or *negligence* grounds, to which refusal to instruct Appellant duly excepted (R. 433). (For full text of proposed Instruction and of Exceptions taken thereto, see Appendix I, page 47.)

10. The trial Court erred in its refusal to give Special Interrogatories to the jury as proposed by Appellant (R. 32-3) which would have enabled determination of whether the jury found liability based on *unseaworthiness* or *negligence,* or both, together with contributory negligence, to which refusal Appellant duly excepted (R. 435). (For full text of proposed Special Interrogatories and Exceptions taken thereto, see Appendix I, page 47.)

11. The trial Court erred by its denial (R. 38) of Appellant's Motion for Judgment Notwithstanding the

Verdict upon the following separate and alternative grounds:

"1. That all such evidence fails to show that plaintiff is entitled to relief from defendant on the ground of *unseaworthiness;*

"2. That all such evidence fails to show that plaintiff is entitled to relief against defendant on the basis of *negligence* or negligent failure to perform any duty owing from defendant to plaintiff;

"3. That all such evidence fails to show any *unseaworthiness* of the vessel or *negligence* of defendant on the basis of which plaintiff would be entitled to recover against defendant." (Italics added) (R. 37)

12. The trial Court erred by its denial of Appellant's Motion for New Trial based upon errors of law with respect to the improper instructions given and as to its refusal to give certain instructions proposed by Appellant as described in Specifications of Error No. 4 through No. 10 as set forth hereinabove (R. 34-5, R. 38).

13. The trial Court erred by its denial (R. 38) of Appellant's Motion for New Trial based on the following grounds:

"3. That the damages awarded plaintiff by the verdict of the jury are excessive and are entirely unsupported as to amount by the undisputed evidence presented in the case;

"4. That the damages awarded plaintiff by the verdict of the jury are so grossly excessive as to unmistakenly indicate that the amount of the verdict was the result of passion and prejudice by the jury." (R. 35)

14. The trial Court erred by its denial (R. 38) of

Appellant's Motion for New Trial based on the following ground:

> "5. Abuse of discretion and error of law by the Court in submitting to the jury general form of verdict without Special Interrogatories requested in writing by defendant thereby rendering it impossible to determine whether the verdict for plaintiff was found by the jury on alleged unseaworthiness or alleged negligence, adversely and prejudicially affecting defendant's rights to preserve these questions for further consideration if an appeal is taken." (R. 35)

Errors of Trial Court Summarized

Specifications numbered 1, 2, 3, 4, 5, 6, 7, 9, 11 and 12 deal in whole or in part with the issue of *seaworthiness or unseaworthiness* and whether Appellee was within the class of workers entitled to recover damages on this theory for injuries sustained while aboard a vessel. They will be discussed under Heading A in the Argument.

Specifications number 1, 2, 8, 9, 11 and 12 deal in whole or in part with the issue of *negligence* and whether Appellee was an invitee, a licensee or a mere trespasser, as related to the extent of duty owed by Appellant to protect Appellee from injuries while aboard the vessel. They will be discussed together under Heading B in the Argument.

Specification No. 13 deals with the amount of the verdict (R. 33) and Appellant's contention that it is unsupported by the evidence, grossly excessive and the result of passion and prejudice. It will be discussed under Heading C of Argument.

Specifications numbered 10 and 14 deal with Appellant's claim of abuse of discretion and error by the trial Court in refusing to submit Special Interrogatories to the jury to enable determination of the jury findings on the separate issues of *unseaworthiness* and *negligence.* They will be discussed under Heading D of Argument.

IV.

ARGUMENT

Summary of Argument

Under the facts established by the evidence admitted during the trial of this cause, and the law applicable to such facts, Appellant submits that:

A. A dock foreman (such as Appellee), employed by a terminal operator engaged in moving cargo across the dock after its discharge from a vessel by another company employed by the shipowner as an independent stevedore contractor, who is injured while temporarily aboard the vessel, is not within the classes of persons entitled to recover for his injuries from the vessel owner on the basis of *unseaworthiness.*

B. A dock foreman (such as Appellee), whose duties and responsibilities only relate to the custody and handling of cargo after it has been discharged from a vessel by a stevedore contractor, is not an *invitee* but only a *licensee* while briefly aboard the vessel to secure information as to the stevedore's plans for discharge of the cargo, which information might be useful to the dock foreman and the terminal operator by whom he was employed. Hence, as to the cause of action of Ap-

pellee based on *negligence,* the shipowner (such as Appellant) did not owe the dock foreman a duty to inspect and locate unsafe conditions or defective equipment but only to warn such a licensee of known dangers and perils and to refrain from wantonly or wilfully injuring him.

C. The verdict of $28,750, considering all of the evidence, was so grossly excessive or monstrous as to unmistakenly show passion and prejudice of the jury.

D. The trial Court should have submitted Special Interrogatories to the jury to enable ascertainment of whether the verdict for plaintiff was rested upon findings of unseaworthiness, negligence, or both.

IV.

A. Warranty of Seaworthiness Does Not Extend to Dock Foremen

(1.) Origin and Recent Extension of Seaworthiness Doctrine

Since the case of *The Osceola* (1903) 189 U.S. 158, 47 L.Ed. 760, courts in the United States have recognized that a *seaman* is entitled to recover damages for injuries caused by the unseaworthiness of the vessel upon which he is serving or of the appurtenances of the vessel.

In 1946 the Supreme Court of the United States extended this doctrine to allow *longshoremen* engaged in loading or unloading work on a ship to recover damages for injuries caused by unseaworthiness. *Seas Shipping Co. Inc. v. Sieracki,* 328 U.S. 85, 90 L.Ed. 1099. This extension was predicated upon the somewhat

questionable assumption by the Supreme Court that longshoremen were "doing a seaman's work and incurring a seaman's hazards," when engaged in loading or discharging cargo to or from a vessel, and hence that longshoremen should be entitled to the same protection from unseaworthiness that had previously been provided for seamen. *The Law of Admiralty,* Gilmore & Black (1957) p. 362.

In 1954 the Supreme Court of the United States extended the applicability of the doctrine of unseaworthiness to include a shore side *carpenter* injured while aboard a vessel for the purpose of repairing the grain trimming facilities to enable the ship to resume loading its cargo. *Pope & Talbot, Inc. v. Hawn,* 346 U.S. 406, 98 L.Ed. 143. In the *Hawn* case, the Supreme Court emphasized that the test was "the type of work he did and its relationship to the ship and to the historic doctrine of seaworthiness." 346 U.S. 413, 98 L.Ed. 152.

In each of the above cases, the rationale underlying the extension of the warranty of seaworthiness to any particular class or type of shore side worker was that they were engaged in the "service" of the ship and doing a "seaman's work," or work that had been historically and traditionally performed by seamen.

(2.) Limitations on Extension Seaworthiness Doctrine

In 1956 this Court applied basically the same rationale and test as in the above cases to find that an *employee of a shipyard* injured by the operation of a shipyard grinding machine in use aboard a vessel was not doing the type of work traditionally done by a seaman

since "Not all repairs are 'ship's work,' to be performed, historically or currently, by the crew." *Berryhill v. Pacific Far East Line* (CA 9th, 1956) 238 F.2d 385, 387. Certiorari was denied by the United States Supreme Court 354 U.S. 938, 1 L.Ed.2d 1537.

The decision of this Court in limiting the extension and application of the doctrine of unseaworthiness has been followed in four more recent cases. *Raidy v. U. S.* (D. Md. 1957) 153 F.Supp. 777, where the court held that a *ship-fitter* working on an inactive dredge in a shipyard for major repairs and conversion was not entitled to recover on the basis of unseaworthiness. In *Berge v. National Bulk Carriers, Inc.* (CA 2) 251 F.2d 717, decided January 10, 1958, the Court of Appeals for the Second Circuit affirmed the trial court's holding that a shipyard *rigger* injured aboard a vessel while employed by a contractor engaged in extensive rebuilding of a ship was not entitled to recover on the basis of a warranty of seaworthiness.

To the same effect, is *Filipek v. Moore-McCormack Lines* (ED NY 1957) 156 F.Supp. 854, where the trial court held that a *rigger* employed by a shore side company to test the ship's cargo handling gear was not doing a seaman's work and not entitled to the warranty of seaworthiness.

In *McDaniel v. Lisholt* (SD NY 1957) 155 F.Supp. 619 a shore side *fireman* had been ordered to remain aboard a ship to check for hidden fires or renewal of fires after a hold fire had been extinguished upon arrival in port. The court held that the fireman was not entitled to recover on the basis of a warranty of sea-

worthiness for injuries sustained in an explosion which occurred in the refrigeration system as a result of the earlier fire.

A contrary result to the *Berge* case, *supra,* seems to have been reached by the Court of Appeals for the Second Circuit in *Halecki v. United N.Y.&N.J.S.H.P. Association* (CA 2, 1958) 251 F.2d 708, where the same Court, and the same panel on the Court, which decided the *Berge* case ruled the same day that an electrician employed by a shore company who was engaged in cleaning with carbon tetrachloride the generators of an inactive (non-crewed) pilot boat in a shipyard for overhaul and repairs was doing a seaman's work and his personal representative could recover for his death caused by unseaworthy conditions aboard the vessel.

In Appendix II to this brief, we have tabulated decisions from various federal courts where a recovery based on the claim of a warranty of seaworthiness has been denied because the courts have found that the particular worker was not performing the type of work, or was not within the class of workers, entitled to a seaman's warranty of seaworthiness. Throughout all these cases, there appears in one form or another the test which we submit is best expressed in the following terms:

> "The test then is not the name given to plaintiff's calling or trade but the nature of his work * * * "
>
> *Berge v. National Bulk Carriers, Inc.*, 148 F. Supp. 608, 610 (Aff'd by CA 2) 251 F.2d 717.

"* * * unless libellant can show that he was performing some job that is or has been a function of the ship's crew, respondent's exceptions must be sustained."

Tarkington v. American President Lines Ltd. (ND Cal) 1955 AMC 114, 115 (involving a Customs officer injured while conducting an inspection on a vessel).

(3.) Factual Reasons and Contract-Tariff Provisions for Not Extending Warranty of Seaworthiness to Appellee

As used during the trial of this case and in other reported cases, the terms "stevedore" and "longshoreman" are usually regarded as synonymous (R. 310). In *The Owego* (WD Wash. ND, 1923) 292 Fed. 505, the court adopted the definition of the term "stevedore" from Bouvier's Law Dictionary as "a person employed in loading and unloading a vessel." See also: *Zampiere v. William Spencer & Son Corp.,* 185 N.Y.S. 639, 640.

In this case, all of the duties and responsibilities of Appellee, and of his employer, related to the movement, handling and custody of the cargo on the dock after it had already been discharged from a vessel and landed on the dock by an entirely different contractor (R. 178-9, R. 181-2).

Seattle Terminals Tariff No. 100 (Exhibit 3), to which the employer of Appellee (R. 176, R. 354) and the Appellant as shipowner (See Item 20, Exhibit 3, R. 441, and Item 30, Exhibit 4, R. 446) had become par-

ties, defines the principal service rendered by the dock-terminal operator as follows:

> "Item No. 420—Handling Defined
>
> "Handling charge is the charge made against vessels, their owners, agents, or operators for *moving freight from end of ship's tackle on the wharf to first place of rest on the wharf,* or from first place of rest on the wharf to within reach of ship's tackle on the wharf. It includes ordinary sorting, breaking down and stacking on wharf." (Italics for emphasis) (R. 443)

Appellee was not a seaman. He was not doing, or responsible for the supervision of, any work aboard the ship such as a seaman — or even a longshoreman — might do. He was not exposed to the hazards of the sea such as the rolling and pitching of a vessel, shipwreck, stranding, fire or disease, nor to the stern discipline of long term employment under shipping articles and penalties imposed on seamen for mutiny, desertion, unauthorized absence, insubordination, or refusal to work. Title 46 U.S. Code Ch. 18, §§564, 565, 576, 592, 595, 599, 655, 662, 701, 703, 704, 705.

On the contrary, Appellee was a shoreside or dock worker, who lived at home and was free to work or quit his waterfront employment at any time he chose to do so. He was provided by his shoreside employer with compensation benefits including hospitalization, medical attention and weekly payments while disabled as a result of on the job injuries (R. 18—Para. VIII). He had no work to perform aboard the vessel which was of any benefit to Appellant shipowner and he happened to

be temporarily aboard only to obtain information to aid him in conducting his shoreside duties (R. 295).

The reasons and rationale expressed in the *Sieracki* case for extending the doctrine of unseaworthiness to longshoremen *performing work aboard a vessel* are wholly absent in the present case. The reason for extending the doctrine of unseaworthiness to a shoreside carpenter in the *Hawn* case, namely that he had *work to do aboard the vessel* to enable it to continue loading a cargo of grain, is likewise entirely lacking in the present case.

(4.) Comparison and Distinctions Between Seaman-Ship Workers and Dock or Harborworkers

Notwithstanding the extreme solicitude with which courts have evaluated and established the rights of seamen, longshoremen and other harborworkers in recent years, we submit that the facts in this case represent a situation so extreme as to render completely illogical and unsound the attempt by the trial Court to apply the concept of a warranty of seaworthiness to Appellee.

In fact, Congress and state legislatures have maintained a sharp distinction between harborworkers and seamen by granting the former compensation benefits from their employers under the federal act, Title 33 U.S. Code §901, *et seq.,* or various state acts including the State of Washington, R.C.W. 51.12.100, *et seq.* In contrast, seamen are excluded from compensation act benefits, Title 33 U.S. Code §903(1), and are provided

with an entirely different remedy by means of an action for damages against their employer for negligence under the Jones Act, Title 46 U.S. Code §901, *et seq.*

While it is true that Appellee here might be in the Supreme Court created "twilight zone," *Davis v. Dept. of L. & I.* (Wash.) 317 U.S. 249, 87 L.Ed. 246, this is not a matter of concern to workers such as Appellee, who most certainly would be entitled to compensation benefits under either the federal or the state act and in fact may have a choice between the two acts in determining where such benefits should be obtained.

The "maritime but local" and "twilight zone" cases have produced a judicial determination on the most similar factual situation to this case with respect to the *status* of a dock worker injured while temporarily on a vessel. In *The Washington* (S.Ct. Cal.) 292 Pac. 120, 1930 AMC 1849, the decedent had been an "assistant wharfinger" at an Oakland dock whose duties were concerned with the care and custody of cargo placed on the dock, for loading to, or after discharge from, vessels. " * * * he took no part in the actual loading or unloading of vessels and exercised no control over persons engaged for that purpose." Occasionally he would go aboard a vessel to secure manifest papers "and thus facilitate the work of unloading." In deciding that the decedent was still subject to the California Workmen's Compensation Act although he was injured while temporarily aboard a vessel the court stated:

> "Teahan was a land employee. His contract of employment was non-maritime and the services required of him were not maritime in character but, in the main, had to do solely with the custody and

protection of property placed on the dock. Here we have the deceased working for an employer whose business is on land and whose contract in its essential details was to be performed on land, temporarily boarding a vessel tied to a dock in order to procure its manifest papers, which, under the evidence, ordinarily would have been delivered to him on the dock by the captain of the vessel.

* * *

"Teahan was essentially a land employee engaged under a non-maritime contract."

The Washington (S.Ct. Cal.) 292 Pac. 120, 1930 AMC 1849, 1851, 1853.

We submit that this Court should not permit the assimilation of *shoreside-dock workmen* such as Appellee into the maritime field of those entitled to a warranty of seaworthiness from the shipowner so as to create absolute liability of the shipowner to such workmen when injured while temporarily aboard a vessel for a purpose of their own and *not in connection with the loading or discharging operation* or in connection with any other work traditionally, historically, normally, presently or otherwise done by seamen.

To extend the doctrine as advocated by Appellee would mean to recognize that almost anyone, be he passenger, guest of a crewmember, cargo surveyor, shipper's representative, customs or immigration official, deliveryman, or any shipyard worker who happened to have a legitimate reason for being aboard a ship, would be entitled to the same warranty of seaworthiness as a seaman, or a longshoreman engaged in doing the "seaman's work" of loading or discharging a vessel.

The courts in this country, including the Supreme Court of the United States, have not gone this far. Thus in a recent case the Court of Appeals for the Second Circuit found that a visitor, who had been issued a pass to go aboard a vessel and was injured when he slipped on a loose stair carpet, was not entitled to recover on the basis of a claim of unseaworthiness. *Kermarec v. Compagnie Gen. Transatlantique* (CA 2-1957) 245 F.2d 175. The Court stated in part as follows:

> "The high duty of care which the maritime law has required of shipowners with respect to seamen arises from necessities of the calling which provoke a solicitude for the seaman's welfare. But the seaman's visitor who attends at his own choice, for a purpose which is of no benefit to the ship, is on sufferance.
>
> "A cause of action for unseaworthiness, while available to seamen and stevedores, is not available to Kermarec who was nothing more than a licensee. *The Osceola,* 1903, 189 U.S. 158, 23 S.Ct. 483, 47 L.Ed. 760; *Seas Shipping Co. v. Sieracki,* 1945, 326 U.S. 700, 66 S.Ct. 58, 90 L.Ed. 413; *Pope & Talbot v. Hawn, supra.* Kermarec did not make any contribution to the ship's safety, preservation or progress; he did not submit his life and safety to the ship as a seaman does; he did not load her for a voyage as a stevedore does; consequently he does not have any right to recover for unseaworthiness."
>
> *Kermarec v. Compagnie Generale Transatlantique* (CA2-1957) 245 F.2d 175, 177, 178.

(5.) Argument on Specification of Errors No. 1 and No. 2—Why Appellant's Trial Motions Should Have Been Granted

Assuming, *arguendo,* the soundness of the above

propositions, we turn now to the claimed error of the trial Court with respect to the cause of action based on alleged *unseaworthiness.*

By the motions at the close of all of the evidence, Appellant sought to have this *unseaworthiness* cause of action dismissed or withdrawn from the consideration of the jury (Specification of Errors No. 1 and 2). We submit that it was reversible error not to grant such motions as there was not a scintilla of evidence that Appellee had any duty or responsibility in connection with the loading or discharge of cargo from the vessel, and in fact, all of the affirmative testimony is to the contrary (R. 323, 391-2). All of such stevedoring-longshoring work was being performed by another company, not the employer of Appellee, and by longshoremen employed by the other company who were not under the control, supervision or direction of Appellee (R. 310, R. 330-1).

While it is true that Appellee claims to have had some legitimate business aboard the vessel (R. 295-6), that does not automatically entitle him to the benefit of a seaman's warranty of seaworthiness. Many workers may have business to conduct aboard a vessel, as mentioned earlier as to deliverymen, cargo surveyors, ship surveyors, inspectors and government officials (R. 79-80; R. 355). But such persons are not entitled to a warranty of seaworthiness (See Appendix II).

(6.) Argument on Error in Instructions on Unseaworthiness—Specifications Nos. 3, 4, 5, 6, 7, 9 and 15

Having erroneously denied Appellant's Motions to withdraw the *unseaworthiness* issue from the jury, we

contend that the trial Court next committed reversible error by its failure to properly submit the *unseaworthiness* claim as an issue of fact for jury determination.

For example, in one of its first instructions on the *unseaworthiness* issue, the trial Court, over objection of Appellant, characterized the Appellee as "a cargo unloading longshoreman and his foreman" (R. 402) and then proceeded to state that:

> "Under the admiralty law, *which applies in this case,* a longshoreman or his *foreman* assigned in unloading cargo * * * " (R. 403) (Italics added)

We submit that this amounted in effect to a *direction* by the trial Court to the jury to find for Appellee on the unseaworthiness count. It cannot be argued with any degree of validity or merit that the next paragraph of the instruction preserved for jury determination the issue of fact as to whether Appellee was within the category of seamen-longshoremen who are entitled under the present decisional law to recover on the basis of unseaworthiness (Specification of Error No. 3 and text of Instruction and Exception in Appendix I, p. 47.)

Similarly in a following instruction the trial Court *told* the jury that Appellee "had the right to go upon such places under (Appellant's) control as were reasonably necessary * * * " without leaving it to the jury to find upon this important issue of fact (Specification of Errors No. 4, R. 425, 428, 437, and text of Instruction and Exception in Appendix I, p. 47.)

Again, in a later instruction, the trial court improperly characterized Appellee as a "foreman of *dock-working longshoremen assisting on the dock in the dis-*

charge of the vessel's cargo" (R. 404). Appellant duly excepted to such *direction* by the Court on an important factual issue as to the status of Appellee and as to the nature of the work in which he was engaged (R. 428, Specification of Errors No. 5 and text of Instruction and Exception in Appendix I, p. 47.)

In defining *seaworthiness* as related to Appellee, the trial Court failed to connect or tie up such definitions and statements with the factual issue as to the status of Appellee (Specification of Errors No. 6, R. 405, R. 432, and text of Instruction and Exception in Appendix I, p. 47). Appellant proposed an alternative instruction (R. 27-8) which, if given, would have overcome the deficiency (Specification of Errors No. 7 and text of proposed Instruction and Exception in Appendix I, p. 47).

It will be noted in Appellant's Proposed Instruction No. 4 and Proposed Instruction No. 15 (text of Instruction and Exception at Appendix I, p. 47) which the trial Court refused, that it was *left to the jury* to determine as a factual issue whether Appellee "was performing work at the time of the accident which would normally be performed by members of the crew." We submit that this is the recognized and proper test to determine whether an injured person is entitled to recover for breach of a warranty of seaworthiness. We also submit that the inclusion of such proposed language in the Court's instructions might have produced an entirely different verdict from the jury, and that the refusal of the trial court to instruct as requested by appellant was a prejudicial error necessitating reversal on this appeal (Specification of Errors No. 7 and No. 9).

Looking cumulatively at all of the instructions given by the trial Court on the issue of *unseaworthiness* it can hardly be denied that they amount *in toto* to a direction by the Court in favor of Appellee on this vital issue. This perhaps rendered unnecessary a determination by the jury on the second issue of *negligence,* although it will never be possible to determine this as the Court arbitrarily declined to submit Special Interrogatories such as proposed by Appellant (R. 32-3, Specification of Errors No. 12 and No. 14 and text of proposed Special Interrogatories and Exception in Appendix I, p. 47), which would have enabled a segregation of jury findings between unseaworthiness and negligence. Appellant duly objected to this refusal (R. 435).

IV.

B. A Dock Foreman Is No More Than a Licensee, and Not an Invitee, When Aboard a Vessel in Connection With Dock Cargo Handling Work

All of the evidence at the trial plainly showed, without exception, that Appellee's duties related only to handling of the cargo on the dock. He had no responsibility for, or supervision of, "cargo loading or discharging" on the vessel (R. 182, R. 184, R. 242, R. 310). It is extremely doubtful whether Appellee's duties on the dock required him to go aboard the vessel (R. 330-32). Even if they did, this would not automatically make him an "invitee" while aboard.

(1.) Classes of Persons Held by Courts To Be Mere Licensees While Aboard Ships

Many types of persons going aboard a vessel have been held to attain the status of only a "licensee."

Swanson v. Luckenbach SS Co. (CA 9-1927) 17 F.2d 735—employee of consignor;

Silverado SS Co. v. Prendergast (CA 9-1929) 31 F.2d 225—friend of master;

The Sudbury (D.Ore. 1926) 14 F.2d 533—employee of consignee;

Kermarec v. Compagnie Gen. Transatlantique (CA 2-1957) 245 F.2d 175—visitor aboard a vessel;

Apostolou v. Eugenia Chandris (D.Ore. 1938) 1938 AMC 995—social guest;

Kosba v. Bank Line (D.Md. 1931) 46 F.2d 119—deliveryman;

The Germania, 10 Fed. Cas. 255, No. 5360—workman employed by cargo owner to bag a grain cargo while aboard a ship;

Lauchert v. American SS Co. (WDNY-1946) 65 F.Supp. 703—seaman passing over one vessel to reach his own vessel;

Aho v. Jacobsen (CA 1-1957) 249 F.2d 309—seaman crossing one vessel to board his vessel moored outboard therefrom;

McDaniel v. Lisholt (SDNY-1957) 155 F. Supp. 619 — shoreside fireman maintaining firewatch on vessel after hold fire extinguished.

(2.) Limited Duty Owed by Ship-Operator to Licensees

The rule as to the duty owed by a shipowner to such licensees has been stated as follows:

" * * * the libelant, being a mere licensee going on this boat *in his own interest or that of his em-*

ployer, the owner of the boat owed him no duty as to its condition, save that it should not knowingly let him run upon a hidden peril, or wantonly, recklessly, or willfully cause him harm." (Italics for emphasis)

The Sudbury (D.Ore. 1926) 14 F.2d 533-34.

Otherwise stated:

"The licensee enters upon the premises at his own risk * * *."

Lauchert v. American SS Co. (W.D.N.Y. 1946) 65 F.Supp. 703, 710.

"The general rule is that the shipowner shall not wilfully or wantonly injure a licensee, or expose him to hidden perils or fail to use due care to prevent injury to him after discovering that he is in danger."

Kermarec v. Compagnie Gen. Transatlantique (CA 2-1957) 245 F.2d 175, 178.

See also:

Restatement of Torts, §343, Comment (a).

(3.) Argument on Error in Instructions on Negligence —Invitee or Licensee—Specification of Errors Nos. 8 and 9

Before the jury in this case could determine the factual issue of whether Appellant was negligent, it was necessary for the jury *to be instructed* as to the legal *difference* between an "invitee" and a "licensee," so that the jury could make a *preliminary factual determination* as to the *status of Appellee.* This the trial Court did not permit the jury to do, by reason of its refusal to give Appellant's Proposed Instruction No.

7 (Specification of Error No. 8, R. 29, R. 433 and text of proposed Instruction and Exception in Appendix I, p. 47).

The instruction on *negligence* as given by the trial Court (R. 406-8) made absolutely no reference to *invitees and licensees* or to the difference in standard of care owed to the two classes of persons. Here again, in its instruction on *negligence,* as was the case in earlier instructions on *unseaworthiness,* the trial Court referred generally and casually to "longshoremen and seamen" (R. 407) without submitting to the jury by appropriate instruction the question as to whether Appellee was an "invitee" or "licensee" while aboard the vessel (R. 433).

The terms "longshoreman" or "stevedore" as sometimes used by witnesses during the trial hold no magic.

> "The test then is not the name given to plaintiff's calling or trade but the *nature of his work,* and viewed in this light it is abundantly clear that plaintiff was not performing usual seaman's work." (Italics added)
>
> *Berge v. National Bulk Carriers, Inc.* (SDNY-1957) 148 F.Supp. 608, 610 (aff'd by CA 2-1958) 251 F.2d 717.

Hence, the mere fact that Appellee stated that he was a "longshoreman" (R. 288) or the fact that men working under him were members of the Longshoremen's and Warehousemen's Union (R. 228-9; R. 364-5) should not determine the *issue of fact* as to whether Appellee was an "invitee" or a "licensee" while aboard the ship. The record is replete with uncontradicted testimony that

Appellee was aboard the ship for a purpose of his own and not in connection with any work to be performed by him aboard the ship nor was he aboard to perform any duty in connection with the discharge of cargo from the ship (R. 73-6, R. 180-84, R. 222-3, R. 238, R. 309-10, R. 330-33, R. 350-51, R. 364-5). Appellant was entitled to have the jury weigh this evidence and determine the status of Appellee under appropriate instructions, but this was not possible under the instructions as given by the trial Court on negligence.

(4.) Argument on Loading or Discharging Operations and Contract-Tariff Provisions

The trial Court seems to have attached great significance to the fact that evidence showed that Appellee had a duty to the shippers of cargo on this vessel not only to transport and discharge the cargo to the dock at Seattle, but to move the cargo from the end of ship's tackle on the dock to its place of rest in the terminal warehouse at Pier 48 (R. 324-6). Because Appellant had such an obligation, the trial Court held that the "handling" of such cargo on the dock, under the supervision of Appellee, was part of the "cargo unloading operations of the vessel" (R. 326).

We submit that the fallacy of this reasoning is obvious, but it may be further demonstrated by the uncontroverted evidence that at the time of the subject accident the Seattle Stevedoring Co. performed *all* of the work at Seattle of *loading* and *discharging* vessels owned or operated by Appellant under a written "Stevedoring Contract" in evidence as Exhibit A-9 (R. 463). Furthermore, all witnesses testified without ex-

ception that Seattle Stevedoring Co. and its employees actually did all of the loading and discharging work, and were doing so at the time of this accident (R. 71-9, R. 91, R. 102-3, R. 174-84, R. 200-01, R. 222-3, R. 242, R. 293, R. 309-10, R. 330-33, R. 358, R. 364).

The operation of "discharging" (and loading) of vessels was being performed by one contractor under one contract (Exhibit A-9, R. 463) while the operation of "handling" the cargo on the dock *after its discharge* was being performed by a separate contractor under a different contract or public terminal tariff (Exhibits 3, 4, R. 443, R. 445, R. 174). The *handling* operation followed the *discharging* operation, but they were not the same. The nature and legal effect of accessorial services such as "handling" and "wharfage" and their inclusion in rates charged and collected by carriers was thoroughly considered by the U.S. Supreme Court in *United States v. I.C.C.* (1956) 352 U.S. 158, 162-3, 1 L.Ed. 211, 215.

The initial error of the trial Court with regard to the *negligence* issue was its failure to grant Appellant's motions to dismiss this cause of action or to withdraw this issue of negligence from consideration of the jury or to direct a verdict for Appellant on the charge of negligence (Specification of Errors Nos. 1 and 2; R. 322, R. 393).

In *Swanson v. Luckenbach SS Co.* (CA 9-1927) 17 F.2d 735, this Court had before it for review on appeal a strikingly similar factual situation. The plaintiff was an employee of a shipper of lumber being loaded aboard a vessel. The shipper had directed plaintiff to

see that the lumber was properly handled from the mill to the dock and to observe whether any of the lumber was damaged while being loaded and stowed aboard the vessel; also, that it was correctly segregated and marked for various consignees when stowed. Plaintiff was injured while aboard the vessel in the course of these duties and sued the shipowner for damages on account of alleged negligence of the persons operating the ship's cargo handling gear.

The trial Court directed a verdict for the defendant on the basis of its finding that plaintiff was a mere licensee while aboard the vessel. On appeal this Court affirmed, stating:

> "Without waiting for the assignment by defendant of other grounds, the lower court directed a verdict upon the theory that, in coming on the ship, plaintiff was not an invitee, but only a licensee.
>
> * * *
>
> "We are inclined to agree with the lower court that technically plaintiff was a licensee, rather than an invitee. But back of mere technical terms our real concern is with defendant's obligations. Clearly we think there was no duty on its part to adjust the mode of carrying on its work to suit the plaintiff's convenience, or, without regard to other considerations, to adopt a plan attended with the least danger to him at all places where he might choose to go. * * * In going forward at the time upon an errand in which the defendant was in no wise interested, he assumed the risk of perils obviously incident to the movement of ponderous timbers swinging at the end of a long fall line."

Swanson v. Luckenbach SS Co. (CA 9-1927) 17 F.2d 735, 736.

Certiorari was denied on this case by the United States Supreme Court at 275 U.S. 534, 72 L.Ed. 412.

This Court again recognized the limitations as to the right of recovery by a licensee in *Silverado SS Co. v. Prendergast* (CA 9-1929) 31 F.2d 225, a case involving a social guest of the master who was injured by falling into an open hatch while aboard a vessel. The opinion of this Court emphasizes that the presence of the guest had no relation to the shipowner's business.

(5.) Argument on Issue of Custom or Practice of Dock Foreman Going Aboard Ship

Appellee herein attempted to raise his status from that of a licensee to that of an invitee by offering evidence tending to show a custom or practice at the port of Seattle for dock foremen to go aboard the vessel during the course of loading or discharging operations (R. 52-3, R. 192, R. 239-40). A similar practice was likewise urged in the *Swanson* case, *supra,* and this Court disposed of it by stating:

> "Such custom or practice as the evidence here tends to show is not thought to be highly material. Defendant does not contend that plaintiff was a trespasser, and a mere license, as well as an invitation, may be implied from custom.
>
> * * *
>
> "Even though we were to take the view that permission to be on board the ship was for a purpose in which the defendant was indirectly interested, surely it was not with the understanding that, upon going into the zone of an operation necessarily attended with danger, he could fail to exercise reasonable care to protect himself against injury."

Swanson v. Luckenbach SS Co. (CA 9-1927) 17 F.2d 735, 736.

The refusal of the trial Court to instruct on the difference between "invitee" and "licensee" status is perhaps an even more serious error which requires reversal by this Court (Specification of Error No. 8). Appellant specifically excepted to the omission of such essentials from the Court's instructions on negligence (R. 432-33 and text of Instruction and Exception in Appendix I, p. 47) and offered a proposed instruction covering these essentials which the Court refused to give (R. 29 and text of proposed Instruction and Exception in Appendix I, p. 47). The error was again called to the attention of the trial Court on Motion for New Trial (R. 34-5) and the trial Court again rejected Appellant's contention (R. 38). Parenthetically, we should like to advise this Court that the *Swanson v. Luckenbach* case, *supra,* and other authorities were cited to the trial Court on this point in our Memorandum of Authorities submitted during the trial of the case and were urged again to the trial Court as controlling on this point during argument of post-trial Motions.

D. Excessive Verdict

Appellee walked off the vessel and was driven to a Seattle hospital by a co-worker immediately after the accident (R. 296-7). He was discharged from the hospital two days later (on July 17, 1956) and thereafter rested and recuperated at home (R. 297).

He was rehospitalized on August 28, 1956, by another doctor that he had consulted sometime after the acci-

dent. He was discharged again from the hospital on September 15, 1956, which was 18 days after admission (R. 151, R. 298).

Meanwhile he had worked at least two days as a longshoreman in July, 1956, before the second hospitalization (R. 298). He resumed work after the second hospitalization on October 22, 1956 (R. 298).

The earnings of Appellee from his work as a longshoreman, bull driver and dock foreman are set forth for several previous years in Exhibit A-6 (text at R. 459) and, after the accident, for the first nine months of 1957 in Exhibit A-5 (text at R. 457). These show an average annual earnings for the 5 full calendar years prior to the accident of $5557.37 per year or over $463 per month. After the accident, in the first nine months of 1957 Appellee earned an average of over $541 per month (R. 317).

Solely on the basis of Appellee's own earnings records and his testimony concerning them, it would appear that he is now earning and is capable of earning in the future, about $78 a month more than he was actually earning per month before the accident. Appellee had worked as a longshoreman as recently as two days before the start of the trial in November, 1957 (R. 318).

Appellant's examining physician, Dr. James Miller, who is an orthopedic specialist, felt that "he could continue at his regular job and was not in need of further treatment" (R. 278), while Appellee's physician, Dr. Bernard Gray, felt that he was not physically able to do the ordinary work of a longshoreman on a steady, full-time basis (R. 160).

In connection with Dr. Gray's above-mentioned opinion as to future limitations on Appellee's ability to work, it should be noted that Appellee had sustained a prior industrial injury to his low back in 1949 resulting in a fusion operation in 1950 for a herniated disc (R. 19, R. 290, R. 312). After that date, and during a period of about six years priors to the present accident in 1956, Appellee had been bothered by back pain and had not undertaken to do the heavy work of a longshoreman. By his own testimony Appellee conceded that due to the former accident his waterfront work had been confined for six years before this accident to working as a truck driver, a dock foreman and to such other work as did not involve heavy lifting (R. 312-13).

These earnings records and the above testimony as to prior injury and pre-existing disability demonstrate and prove without dispute that any loss of earnings or of earning power sustained by Appellee as a result of this accident was only temporary and of short duration during the 5 or 6 months immediately following the accident. A liberal calculation of such loss of earnings would not exceed $750.

The only other special damages proved by Appellee were the following bills:

Exh. 1—Providence Hospital	$585.75	(R. 87)	
Exh. 2—Swedish Hospital	96.45	(R. 88)	
		682.20	
Dr. Bernard Gray		544.00	(R. 162)
			$1226.20

No effort was made by Appellee to prove any estimated future medical expenses, if such should be incurred.

Thus, the grand total of the proved special damages is $1976, or let us say, not to exceed $2000. Of the total of $28,750 allowed by the jury verdict more than $26,000 must represent allowance for pain and suffering or general damage.

It may be true that this appellate Court has adopted and followed a rather strict and severe rule with respect to the right to review and interfere with the discretion of a jury to determine and fix the amount of damages awarded in personal injury cases. *Pacific Greyhound Lines v. Rumeh* (CA 9-1949) 178 F.2d 652, 654. *Southern Pacific Co. v. Guthrie* (CA 9-1951) 186 F.2d 926.

This Court must recognize, however, that in a proper case, either the award by a jury, or the award by a trial judge in a non-jury case may be found improper. Thus, in *Cobb v. Lepisto* (CA 9-1925) 6 F.2d 128, this Court reversed a judgment based upon a $6500 jury verdict in a case involving a miner's claim for services rendered, upon the ground that the amount of the jury award was "grossly excessive."

Within the last few months this Court has reversed a judgment in a seaman's action for personal injuries (non-jury case) on the ground of inconsistency between the findings of fact as to injury and the conclusion as to amount of damages. *Farley v. U. S.* (CA 9-Jan. 6, 1958) 252 F.2d 85. Surely, if such appellate review is presently recognized in non-jury cases, this Court must continue to have the power to review the award by a jury as in this case, and to determine whether the trial Court

erroneously refused to grant a new trial on the grounds of an excessive award of damages so gross as to indicate that it was the result of passion and prejudice of the jury (Specification of Error No. 13, R. 35).

It is submitted that passion and prejudice of the jury may be imputed from the size of the verdict. The amount awarded Appellee over and above his proved special damages is substantially more than Appellant should pay, assuming, *arguendo,* that liability has been validly established.

28 U.S. Code §2106 provides that this Court may:

> "affirm, modify, vacate, set aside or reverse any judgment, decree or order of a court lawfully brought before it for review, and may remand the cause and direct entry of such appropriate judgment, decree, or order, or require such further proceedings to be had *as may be just under the circumstances.*" (Italics for emphasis)
>
> 28 U.S. Code §2106.

We submit that it is incumbent upon this Court to perform its statutory duty by reviewing and correcting any error committed by the trial Court or the jury with respect to the amount of the verdict in this case.

The verdict must represent either an allowance for sympathy, an excessive figure based on prejudice against a corporate defendant, a misconcept as to the ability of this defendant to pay, or a combination of such factors. Certainly there is no evidence in the record sufficient to justify the amount awarded Appellee by the jury in this case, or even closely approaching such a figure.

We therefore earnestly submit that
should be fixed to be remitted from the
dition for not requiring a new trial.

**E. Special Interrogatories Should Have
to the Jury to Enable Segregation
Unseaworthiness and *Negligence* or**

The importance of these Specificatio
10 and No. 14. Full text of Special I
proposed and Exceptions to their refu
I, p. 47) has been briefly discussed ea
in connection with our concluding re
seaworthiness issue. The necessity of
cial Interrogatories under the pleadi
issues in this case has been demonstrat
nation of *unseaworthiness* and *negligen*
were submitted to the jury by the trial
ther illustrated by the statement of t
peals for the Eighth Circuit in rever
entered on a jury verdict in a wrongfu

> "Where several issues of fact a
> one of them is erroneously submi
> over the objection of a defendan
> verdict is returned against him,
> have the verdict set aside and to
> This is because it is impossible to

the "sound discretion" of the trial judge, this recently recognized the importance and neces taining answers from the jury to special inter in a negligence case. In *Union Pacific Railr Bridal Veil Lumber Co.* (CA 9-1955) 219 F.2 the court states with respect to answers by t Special Interrogatories:

> "To this court, it seems that the disagr the jury on *one vital question* left a gap the special verdict." (Italics for emphas

Upon the basis of the failure of the jury to a an answer to one of the special interrogatori ted, this Court reversed the judgment of the t and remanded the case for a new trial.

Following the same reasoning, we submit t case a new trial should be granted because fusal of the trial Court to submit proposed S terrogatories to the jury which would have determination as to which of the two alleged b bility were found proved. The importance of regation of the findings of the jury is inher other issues as to unseaworthiness and negligе by this appeal.

V.

CONCLUSION

United States Supreme Court to grant a petition for writ of certiorari, 354 U.S. 938, 1 L.Ed. 1537.

Recent cases cited from other Circuits in Appendix II give strength to the position taken by this Court in *Berryhill, supra,* that limitations must now be placed on the doctrine of absolute liability for unseaworthiness as already extended by the *Sieracki* and *Hawn* cases, *supra.*

Thus, in *Lee v. Pure Oil Co.* (CA 6-1955) 218 F.2d 711, the Sixth Circuit stated:

> "To extend the doctrine of unseaworthiness to the circumstances of the present case would not only extend it well beyond the facts of the Sieracki case, but would stretch it almost beyond recognition. Here the deceased was not performing a ship's service with the owner's 'consent or by his arrangement.' He was at best a mere volunteer."
>
> *Lee v. Pure Oil Co.* (CA 6-1955) 218 F.2d 711, 713.

The Second Circuit, speaking through Judge Learned Hand in *Guerrini v. U. S.* (CA 2-1948) 167 F.2d 352, expressed its reluctance to further extend the warranty of seaworthiness beyond the extension by the Supreme Court in the *Sieracki* case as follows:

> " * * * Yet we should hesitate to read the decision as intended to extend the protection of what amounts to a warranty of seaworthiness to all workmen upon a ship, however casual their presence there, and however much their relation to the employer is unlike the early paternalistic status of master and crew, many of whose features have vestigially persisted to the present time. * * * "

Guerrini v. U. S. (CA 2-1948) 167 F.2d 352, 354.

We submit that both on the issue of *seaworthiness* and the issue of *negligence* the trial Court misconstrued the applicable law and in addition made an unwarranted invasion of the province of the jury in determining factual issues. In addition, we contend that it committed an abuse of discretion in not submitting Special Interrrogatories, and additional prejudicial error in not granting defendant relief from the excessive damages awarded by the jury verdict.

For each of the above reasons, Appellant submits that the judgment of the trial Court should be reversed.

Respectfully submitted,

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APPENDIX I

Text of Instructions and Appellant's Exceptions to Instructions Given and Refused as Mentioned in the Specification of Errors

NOTE: Italicized words in text of instructions identify insofar as possible the specific language to which exception was taken.

Specification No. 3
Instruction:

"By the admiralty law, which relates to ocean shipping activities and incidents connected therewith, the owner of a vessel is liable to indemnify a *cargo unloading longshoreman and his foreman* for injuries and damages proximately caused by the unseaworthiness of the vessel or its appurtenant appliances and equipment. It is immaterial whether the shipowner knows of the dangerous and unseaworthy condition, because the shipowner owes the longshoreman a continuous duty to provide him a safe place in which to work. This duty cannot be delegated to anyone else.

"Under the admiralty law, which applies in this case, *a longshoreman or his foreman assigned in unloading cargo* from a ship does not assume the risk of an unsafe, improper and unseaworthy place to work. The shipowner is under a continuing, nondelegable duty to keep the ship and its appliances seaworthy, safe and in proper condition.

"Recovery on the ground of unseaworthiness is limited to seamen and others such as longshoremen performing work for the ship such as discharging cargo which historically and until recent times was done by members of the ship's crew.

"It was the duty of the defendar
ping contract with shippers to un
from the ship and store it on the
warehouse on the dock. To perfor
fendant made *cargo discharge a*
sulting in two independent contra
employees in *such cargo work*. O
tractors, Seattle Stevedore Co.,
ployees unloaded the cargo from
the outside dock platform under sl
the other such contractor, Olympi
moved the cargo onward from that
of rest on the dock floor inside
house." (R. 402-3)

Exception:

"The particular language whic
objects to is the use of the phrase '
longshoreman and his foreman.'
submits now, as it has earlier in
that is a factual issue as to the sta
tiff which should be left to the jur
be expressed in those terms by the
on the contrary, in defendant's
pressed in the terms of the law i
such as was proposed by defend
No. 15." (R. 421-2)

Exception:

"It is objected to on the basis of be
proper comment upon the evidence or
within the province of the jury and a
ground that it is an inaccurate statem
fact." (R. 423)

"We further object to that same par
the grounds that it is an unnecessary c
the Court on the evidence and an unne
rection by the Court on a factual issue as
or not employees of the Olympic Steam
pany such as the plaintiff had the righ
the ship, which we submit in behalf of t
ant is an issue which should be left to t
eration of the jury and not determined by
in these instructions." (R. 425)

"The Court: * * * The Court now allo
ception with like effect as if it were then
cause it now is made with the understa
tween Counsel and the Court it will ha
fect as if made after the striking and co
(R. 428)

Specification No. 5

Instruction:

"In order for the plaintiff to recover
in any event find from a preponderance
dence that the plaintiff was at the time o

hand, and in that event plaintiff v
titled to recover in this case." (R.

Exception:

"The paragraph beginning, 'In
tiff to recover,' defendant objects
by the Court in that instructio
longshoremen' on the ground and
that defendant submits that that i
as to the status of the plaintiff as
which should be left to the deter
jury and should not be so defined i
as to be a direction on that parti
sue." (R. 428-9)

Specification No. 6

Instruction:

"As to plaintiff's allegations of
of the vessel, you are instructed tha
worthy when, respecting the vessel
ances, appurtenances, cargo and c
is reasonably fit for the voyage a
which the vessel is to be applied.

"The standard of seaworthines
tion, but reasonable fitness.

"A vessel is unseaworthy when
gral appurtenances, appliances o
not reasonably safe for the uses w

fect rendering the appliance unseawo
sufficient was a latent defect.

"If you find that the P & T ADVENTU
seaworthy before and at the time of
and that the plaintiff was injured or d
proximate result thereof, then I instr
in order for plaintiff to recover it is n
that he prove that the shipowner or o
notice or knowledge of such unseaworth
or the means of obtaining it." (R. 405-

Exception:

"I don't have those before me, but
to express an objection by the defend
and every one of such instructions on
and for the reason as to each of them t
not tied in with the status of the plain
jury is not instructed as to the necessi
mining the status of the plaintiff while
ship * * *." (R. 432)

Specification No. 7

Proposed Instruction:

"The plaintiff has alleged liability
of the defendant because of unseaworth
fendant's vessel.

"You are instructed that a vessel i
when it is reasonably fit for the voyage
to which the vessel is to be applied. It i

sible vessel and gear, and his obligation as to seaworthiness is satisfied by provision of a vessel and gear reasonably safe and suitable even if there may have been equipment more modern or more perfect in some detail. The standard of seaworthiness is not perfection but reasonable fitness.

" 'Unseaworthiness' exists whenever the vessel itself or its appliances, appurtenances, or places of work are not reasonable, safe or adequate for the purposes for which they are intended or ordinarily used.

"Recovery on the grounds of unseaworthiness is limited to seamen and to those persons performing work for the ship which normally has been performed by members of the crew of the vessel.

"Before plaintiff can recover in this case he must establish two facts. First, he must prove that the vessel was unseaworthy. Secondly, *he must prove that he was performing work at the time of the accident which would normally be performed by members of the crew."* (R.27-8)

Exception:

"I don't have those before me, but I would like to express an objection by the defendant to each and every one of such instructions on the ground and for the reason as to each of them that they are not tied in with the status of the plaintiff and the jury is not instructed as to the necessity of determining the status of the plaintiff while aboard the ship as proposed by defendant in the last two paragraphs of Defendant's Proposed Instruction No. 4, and we object to the refusal of the Court to give those sections of Instruction No. 4 as proposed by the defendant." (R. 432)

Specification No. 8

Proposed Instruction:

"In deciding whether or not plaintiff is entitled to recover from the defendant on the charge of negligence you must *determine whether plaintiff was a 'licensee' or an 'invitee' while aboard the* 'P & T ADVENTURER' since the extent of the owner's duty owing to the two classes of persons differs under the law applicable to this case.

"An 'invitee' is one who is either expressly or impliedly invited onto the premises of another for some purpose connected with the business in which the shipowner or operator is then engaged. To establish such relationship there must be some real or supposed mutuality of interest in the subject to which the visitor's business relates. As to an invitee the shipowner must use reasonable care to discover the actual condition of his premises and either make them safe or to warn him of any latent dangers or defects in the ship or its appliances.

"A 'licensee' occupies an intermediate position between that of an invitee and that of a trespasser. He is one who goes upon the premises of another, either without any invitation, express or implied, or else for some purpose not connected with the business conducted on the ship, but goes, nevertheless with the permission or at the toleration of the owner. As to a licensee the shipowner owes him no duty as to its condition, except that it must warn him of perils known to the shipowner and must refrain from wantonly or wilfully injuring him. * * * " (R. 29)

Exception:

"Likewise the instructions which thereafter followed, which I'll have to refer to generally as I

don't have a copy of them, pertaining to negligence and the burden of proof on the plaintiff with respect to the issue of negligence. Defendant objects to each of those instructions as given by the Court on the ground and for the reason as to each of such instructions dealing with negligence that they do not contain portions relating to the necessity of establishing the relationship of the plaintiff to the ship or to the defendant while he was aboard the ship such as were proposed by the defendant in its Instruction No. 7, Proposed Instruction No. 7, and defendant further objects to the refusal of the Court to give Instruction No. 7 as proposed." (R. 433)

Specification No. 9

Proposed Instruction:

"The defendant has pleaded that if plaintiff was injured as alleged in his complaint, any such injuries were caused and contributed to by his own carelessness and negligent acts.

" 'Contributory negligence' is negligence or want of care, as herein defined, on the part of a person suffering injury or damage which proximately contributes to cause the injury and damage complained of.

"In many cases contributory negligence on the part of a plaintiff would defeat his recovery entirely. Since this case is governed by maritime law, a different rule as to contributory negligence is applicable.

"I instruct you that in the event you should find that plaintiff himself was negligent as to any of the acts or omissions as alleged by defendant, such negligence of plaintiff does not bar him from recovery of damages under his complaint, unless you

find that such injuries or damages were caused solely by plaintiff's own negligence, or the sole negligence of some third party, in which event your verdict will be for the defendant.

"*If* you find that plaintiff's injuries or damage, if any, were caused solely by the unseaworthiness of defendant's vessel and *you also find that plaintiff was performing work on the vessel which would normally be performed by seamen or members of the crew so as to be within the class of persons to whom defendant owed a duty to provide a seaworthy vessel,* then your verdict will be for the plaintiff, and you will determine the full amount of his damages which you find that he has sustained as the result of the alleged injuries according to the rules on damages about which I will hereafter instruct you.

"*If* you find that the plaintiff was negligent, and *you also find that plaintiff was performing work on the vessel which would normally be performed by seamen or members of the crew so as to be within the class of persons to whom defendant owed a duty to provide a seaworthy vessel,* and the defendant's vessel was unseaworthy, or if you find that defendant was negligent and that such unseaworthiness or negligence, if any, contributed to cause the accident of which plaintiff complains, then your verdict will be for the plaintiff and against the defendant, but after determining the full amount of plaintiff's damages, you will diminish the amount to which he would be entitled to recover against the defendant by the proportion in which you find that plaintiff's own negligence contributed to cause his own injuries or damages, if any. (R. 30-32)

Exception:

" * * * the objections of the defendant go to the

failure of the Court to give defendant's Proposed Instruction No. 15 which we feel would be a more adequate statement of the rule as to mitigation of damages and would include in the instruction on damages the necessary portions relating to the determination of whether or not the plaintiff was within the class of workers entitled to recover on a warranty of seaworthiness and also, on the issue of negligence, whether the plaintiff was within the class of workers defined as invitees to whom one duty of care was owed or was within the class of workers defined as licensees to whom another duty of care would be owed." (R. 433-4)

Specification No. 10

Proposed Special Interrogatories:

"In addition to your verdict in this case, you will answer the following interrogatories:

"Interrogatory No. 1: Was the condition of ship's gear and equipment a proximate cause of this accident?

"Answer: ('Yes' or 'No')

"Interrogatory No. 2: If your answer to the preceding interrogatory is 'yes,' was this accident caused solely or in part by the condition of the ship's gear and equipment?

"Answer: Solely ('Yes' or 'No')

In part ('Yes' or 'No')

"Interrogatory No. 3: Was the manner in which longshoremen, employed by a third party, used the ship's gear and equipment a proximate cause of this accident?

"Answer: ('Yes' or 'No')

"Interrogatory No. 4: If your answer to Interrogatory No. 3 is 'yes,' was this accident caused solely or in part by the manner in which longshoremen, employed by a third party, used the ship's gear and equipment?

"Answer: Solely ('Yes' or 'No')

In part ('Yes' or 'No')

"Interrogatory No. 5: Was the plaintiff negligent?

"Answer: ('Yes' or 'No')

"Interrogatory No. 6: If your answer to Interrogatory No. 5 is 'yes,' was such negligence of plaintiff the sole or a contributing cause of the accident, and if contributing, in what percentage?

"Answer: ('Sole')

('Contributing')

(Fill in percentage plaintiff's negligence contributed)" (R. 32-3)

Exception:

"Defendant finally objects to the refusal of the Court to give special interrogatories to be answered by the jury as proposed by defendant accompanying its proposed instructions as submitted to the Court at the commencement of the trial of this case. Defendant feels that since we have here what purports to be a single cause of action grounded on either unseaworthiness or negligence, in order to preserve the record, in order to determine the basis on which the jury finds liability, if they should find liability, it is essential and imperative that we have special interrogatories." (R. 435)

APPENDIX II

Tabulation of Cases Since *Sieracki* Case Holding Various Classes of Persons Not Entitled to Warranty of Seaworthiness

Type of Worker	*Name of Case*	*Court and Date*	*Citation*	*Remarks*	*Reference in This Brief*
Repairman working on engine of ship	*Berryhill v. Pacific Far East Line*	CA 9 1957	238 F.2d 385; cert. den. 354 U.S. 938, 1 L. Ed.2d 1537	Decided after *Hawn* case	18, 43, 44
Bricklayer engaged in cleaning ship's tanks	*Guerrini v. United States*	CA 2 1948	167 F.2d 352	Slipped on patch of grease	44, 45
Shipyard rigger engaged in installing ing tank bulkhead	*Berge v. National Bulk Carriers, Inc.*	CA 2 1958	251 F.2d 717	Decided after *Hawn* case	18, 19, 20, 32
Shipyard fitter engaged in installing hopper on dredge	*Raidy v. United States*	D. Md. 1957	153 F.Supp. 777	Decided after *Hawn* case	18
Tank cleaner engaged in cleaning tanks enroute between ports	*Rich v. United States*	CA 2 1951	192 F.2d 858	Slipped on ladder as leaving ship	58

Tank cleaner engaged in repair of bottom damage	*Manera v. United States*	E.D. N.Y. 1954	124 F.Supp. 226	Fell from ship's ladder	59
Shipyard rigger engaged to test cargo handling gear of ship	*Filipek v. Moore-McCormack Lines*	E.D. N.Y. 1957	156 F.Supp. 854	Decided after *Hawn* case	18
Shipyard rigger engaged in removal main engine pistons for overhaul	*O'Connell v. Naess*	CA 2 1949	176 F.2d 138	Eyebolt furnished by ship broke	59
Shipyard rigger using ship's cargo winches to set in place defense guns	*Peterson v. United States*	S.D. N.Y. 1947	80 F.Supp. 84	Link broke in chain supplied by ship	59
Ship cleaner engaged in cleaning holds after discharge of cargo	*De La Pena v. Moore-McCormack Lines*	S.D. N.Y. 1948	84 F.Supp. 698	Stepped on loose metal strips and fell	
Surveyor-repair superintendent	*Martini v. United States*	CA 2 1951	192 F.2d 649	Cargo batten carried away while surveying hold	59

APPENDIX II (continued)

Type of Worker	*Name of Case*	*Court and Date*	*Citation*	*Remarks*	*Reference in This Brief*
Municipal fireman standing fire-watch on vessel	*McDaniel v. Lisholt*	S.D. N.Y. 1957	155 F.Supp. 619	Decided after *Hawn* case	18, 30
Delivery truck driver carrying a supply of bread aboard a tug	*Lee v. Pure Oil Company*	CA 6 1955	218 F.2d 711	Drowned while crossing barge to tug	44
Seaman applying for employment on vessel	*Milo v. Calmar Steamship Co.*	N.D. Cal. 1956	1956 A.M.C. 2149	Summary Judgment granted defendant shipowner	60
Customs officer searching vessel for contraband	*Tarkington v. American President Lines*	N.D. Cal. 1954	1955 A.M.C. 114	Shipowner's exceptions to libel sustained	20
Visitor who had been issued pass to go aboard ship	*Kermarec v. Compagnie Gen. Transatlantique*	CA 2 1957	245 F.2d 175	Decided after *Hawn* case	25, 30, 31

Table of Exhibits as Required by Rule 18-2(f)

Exhibit Number	*Description*	*Identified*	*Offered*	*Admitted*	*Location in Record*
For *Plaintiff*					
3	Seattle Terminals Tariff No. 100 (Excerpts)	176-7	187	187	441-4
4	Seattle Terminals Tariff No. 2-D (Excerpts)	176-8	187	187	445-50
7	Letter of October 14, 1957, from Waterfront Employers Ass'n. showing hours of work of Jack Cordray	346	346	346	451-2
For *Defendant*					
A-1	Log Book of SS "P&T ADVENTURER" (Excerpts)	91-2	92	92	453-5
A-5	Letter of October 4, 1957, from Waterfront Employers Ass'n. showing earnings of Jack Cordray	341-3	344	345	457-8
A-6	Letter of March 1, 1957, from Waterfront Employers Ass'n. showing earnings of Jack Cordray	342-4	344	345	458-9
A-7) A-8)	Photographs taken aboard SS "P&T ADVENTURER" on July 15, 1956 (day after accident)	203-4, 365-6	204-5	205	460-1
A-9	Stevedoring Contract of July 1,	349-51	352	352	463-72